goal of this letter is to introduce these difficulties to the extent necessary to have the papers resubmitted, docketed by your Office and the substantive motion heard by the Court prior to a decision to grant or deny certiorari.

The original motion, certification of service and letter of transmittal were given to Federal Express June 11, 2002 for overnight (next business day) delivery. It argues for and seeks access to the certiorari pool memo in this case prior to a decision to grant or deny certiorari. A number of pages are devoted in fact and law to the cert pool memo being a judicial and hence public document.

Mr. Atkins, in a letter dated June 15, 2005, notes the motion papers are returned. The reason is "[t]he rules of this Court make no provision for the filing ofa motion for access to the certiorari pool memorandum." Since the Rules do not specify, and certainly do not forbid, the unspecified motion, the motion should have been submitted to the Court. It was not.

Immediately following my receipt of the aforesaid letter I spoke with Mr. Atkins and Mr. Vasil. Mr. Adkins repeated the content of his letter. I noted the motion was an unspecified motion containing a jurisdictional statement and that the Court has heard similar requests. Mr. Atkins response had two parts. He stated the motion would only be filed if I could produce an earlier case showing the Court has previously addressed the exact issue at hand. More is said of this below. Mr. Atkins also warned me it would be "unwise" to resubmit the motion. I told him I would make no promises but would think about it.

Everything about my conversation with Mr. Atkins seemed out of character. Mr. Atkins has always been attentive and helpful (and I am grateful to him). But the last conversation, in content

and tone, was surprising. It seemed pressured because it was searching and lacked conviction.

Thus, I called Mr. Christopher Vasil (who I have come to know is the Chief Deputy Clerk). Mr. Vasil not only sounded irritated by the mere fact that I called but lost all control after he asked for and heard a partial summary of the motion's subject. I say partial because Mr. Vasil quickly interrupted with an emotional outburst where he said, in part, that in his twenty three (23) years at the Court no such motion had ever been submitted and such a motion would not be filed. The conversation ended abruptly when Mr. Vasil, without pause, said there was nothing further to discuss, said goodbye and hung up.

The unstamped original and copies of an (1) application/motion to the Court for leave to file, (2) the original motion, (3) certification of service, and (4) letter of transmittal were sent on July 18,2005 and delivered to the 3035 V Street on July 19,2005. All documents were returned with a July 22, 2005 dated letter from Mr. Vasil (copy attached as Page 4). Oddly, the shipping manifest and Fed Ex instructions were cut from the box used for delivery to the Clerk and also returned (copies attached as Page 5).

The letter reads:

"The motion seeking access to the pool memorandum in your case was received July 21, 2005, and is herewith returned. Pool memoranda are not public documents."

The application/motion and original motion were not submitted to an individual justice or the entire Court. Rather, all documents were returned and there are no entries on the docket. Mr. Vasil kept his promise. Yet, it is obvious Mr. Vasil views the application/ motion to file as well as the original motion as appropriate

because he returned all documents for a substantive reason, i.e. "[p]001 memoranda are not public documents." Finally, although the issue appears to be one of first impression, and as the original motion argues, because this Court and other courts have so held, a denial requires specificity not present in Mr. Vasil's letter.

Both the Clerk's Office and OSG have been kept appropriately informed about my concerns with the cert pool. It goes without saying the issue has been brewing for years in both the legal community and the public. So too, it is in my interest that access to certiorari review is proper and the process by which it is reviewed is fundamentally fair. It should not be trivialized.

Therefore, the above acts only add further cause for continuing to seek judicial review of the nature and effect of the certiorari process. Therefore, I am asking your help in the resubmission (it is available in either 6 1/8 x 9 1/4 or 8 1/2 by 11 format), filing and hearing of the substantive motion. I look forward to hearing from you.

Thank you.

Respectfully,
s/ Paul A. Reilly
Paul A. Reilly, Pro Se

CC: Deputy Clerk Christopher W. Vasil, Jeffery Atkins by 2nd day Federal Express, Office of the Solicitor General and all counsel by certified mail.

Paul A. Reilly
153 Park Avenue
Randolph, N.J. 07869
(973) 945 - 1078

Mr. William K. Suter
September 2, 2005

Clerk of the Court
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Reilly v. Weiss, et al.
Docket No. 04-1686

Dear Clerk Suter,

I am in receipt of the August 18, 2005 dated letter. Thank you for the response.

Regrettably, the letter only serves to produce further action concerning the matter. Accordingly, in the midst of these difficult circumstances, the purposes of this letter are to (1) advise you that the following actions are objected to and are a source of further challenge, (2) evoke necessity to obtain ministerial guidance, and (3) not to seek adjudication by your Office or Office personnel on the merits.

In light of the short response contained in the August 18 letter it is appropriate to reassemble what has transpired before turning to the issues at hand.

In my August 1,2005 dated letter to you I asked for your help in transmitting two unspecified motions (or application) to the Justices

for their judicial determination. The first is substantive, i.e. it seeks access to the cert pool memoranda in this case prior to a decision on certiorari and challenges the process on Constitutional and other grounds. A clerk refused to file the unspecified motion on the ground the rules make no provision for filing it.

The second motion/application asks the Justices to hear the substantive motion, i.e. it challenges the clerk's' refusal to file said motion based on the bare assertion the rules make no provision for filing it. This document was submitted subsequent to an underserved and intolerant telephone outburst by a Deputy Clerk who first declared "pool memoranda are not public documents" and that the motion would not be filed. And indeed, both motions were rejected by said Deputy. As a result you were contacted via the more the detailed August I, 2005 letter. The August I, 2005 letter seeks you help in having the motions filed, not adjudicated.

Given the above facts the August 18, 2005 dated letter is disappointing for a number of reasons.

1. The letter's declaration "pool memoranda are not public documents" assumes the judicial power vested in the Justices by its deciding the substantive merits of the first motion. A decision your Deputy believes is one of first impression.

2. It not only denies access to the Court, it elevates the power of the Office of the Clerk above the power of the Justices by denying access to the Justices for a substantive determination as to whether the pool memorandum are judicial documents subject to Constitutional and common-law presumptions of access and whether the pool process impermissibly violates the Constitution and other laws. It also denies access to the Justices and denies the Justices of their judicial power to review acts and omissions taken by personnel in the Clerk's Office.

3. The inference that arises from the shortness of your letter is that even though all of the above is true the Constitutional crisis said acts and omissions create, i.e. claiming the power of substantive judicial review and elevating that power above the authority of the Supreme Court, this off the record activity should be overlooked because the result, to the passive observer, might be correct [1]. Yet it is because of the temptation to diminish and prejudge such arguments that this Court and statute require specificity for and in so holding that does not exist and, like the Deputy's rejection, is not present in your letter. In sum, it is a disappointment that clerk personnel have embarked on a circular course of action that adjudicates the very matters sought to be presented to the Justices for their determination and then use that adjudication as the basis for denying access to judicial review. And, it is this disappointment which requires further action.

The previous motions (applications) have been submitted with the purpose of a determination prior to a decision on whether or not to grant certiorari. The conference is scheduled for September 26, 2005. Consequently, please advise me as to the format and what must be done in order for it to be heard prior to the Conference. Also, since the above matters have not been addressed, please provide me with a copy of the 1993 Statement of Recusal Policy and any updates.

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[1] Ironically, Meyer, Brown set forth a similar on point argument in the consolidated cases 03-1034, Estate of Kantor, et al. v. Commissioner of Internal Revenue and 03-184, Ballard v. Commissioner of Internal Revenue. Although not reached by the Court in that matter, it acknowledged the arguments to be substantial. Yet, with their open incorporation in the rejected motion they somehow lose their significance.

Clerk personnel may contact me at (973) 945 - 1078 about the above requests. If for some reason I am unable to answer a call, the call is forwarded to a date and time stamped voice mail. Any missed call will be promptly returned.

Thank you.

Respectfully,

s/Paul A. Reilly

Paul A. Reilly, Pro Se

CC: Office of the Solicitor General, Christopher Carey, Leon Piechta, John Patti.

No. 03-6747

IN THE SUPREME COURT OF THE UNITED STATES

M.K.B., PETITIONER

v.

WARDEN
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE [] CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION
WITH APPENDIX UNDER SEAL

The Solicitor General, on behalf of the respondent, respectfully moves this Court to permit the filing under seal of unredacted copies of the brief in opposition and its appendix. This matter pertains to information that is required to be kept under seal, as further explained in the government's unredacted brief in opposition.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record

JANUARY 2004

No. 03-6747

In The
Supreme Court of the United States

M.K.B.,

Petitioner,

v.

Warden, et al.,

Respondent. -

MOTION TO INTERVENE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; ABC, INe.; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; AMERICAN IMMIGRATION LA WYERS ASSOCIATION; AMERICAN LA WYER MEDIA, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES; CABLE NEWS NETWORK LP, LLLP (CNN); GANNETT CO., INC.; KNIGHT RIDDER, INC.; HEARST CORP.; MILITARY REPORTERS & EDITORS, INC.; NATIONAL FEDERATION OF PRESS WOMEN; NATIONAL NEWSPAPER ASSOCATION; NATIONAL PRESS CLUB; NEWSPAPER ASSOCIATION OF AMERICA; NEWSPAPER GUILD-CWA;

NEW YORK TIMES CO.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RADIO-TELEVISION NEWS DIRECTORS ASSOC.; SOCIETY OF PROFESSIONAL JOURNALISTS; and WASHINGTON POST CO.

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Additional Counsel Listed In Signature Block

Docket for 03-6767
Page 1 of 2

No. 03-6747 .
Title: M.K.B., Petitioner
v.
Warden, et al.
Docketed: October 6, 2003

~~Date~~	~~~~~Proceedings and Orders~~~~~~~~~~
Jun 27 2003	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 5, 2003)
Oct 6 2003	Motion (03 M I) for leave to file a petition for writ of certiorari under seal with redacted copies for the public record Granted.
Oct 16 2003	Waiver of right of respondents Warden, et al. to respond filed.
Oct 23 2003	DISTRIBUTED for Conference of November 7,2003.
Nov 3 2003	Response Requested. (Due December 3, 2003)
Nov 3 2003	Brief amicus curiae of Reporters Committee for Freedom of the Press filed. (Printed Brief)
Nov 26 2003	Order extending time to file response to petition to and including January 2, 2004.
Jan 2 2004	Motion for leave to intervene filed by Reporters Committee for Freedom of the Press, et. al.
Jan 5 2004	Motion for leave to file brief in opposition under seal filed by respondents Warden, et al.
Jan 14 2004	Response of petitioner to motion of respondent for leave to file brief in opposition with appendix under seal filed.
Jan 14 2004	Motion of petitioner for leave to file reply brief under seal with redacted copies for the public record filed.

Jan 14 2004	Response to.motion for leave to intervene from petitioner M. K. B. filed.
Jan 15 2004	DISTRIBUTED for Conference of February 20; 2004.
Jan 21 2004	Reply brief of Reporters Committee for Freedom of the Press, et al. in support of Motion to Intervene filed. (Distributed)
Feb 23 2004	Motion for leave to intervene filed by Reporters Committee for Freedom of the Press, et. al. DENIED.
Feb 23 2004	Motion for leave to file brief in opposition under seal GRANTED.
Feb 23 2004	Motion of petitioner for leave to file reply brief under seal with file redacted copies for the public record GRANTED.
Feb 23 2004	Petition DENIED.

~~Name~~~~~~~~ ~~~~~~Address~~~~~ ~~Phone~~

Attorneys for Petitioner:

Paul M. Rashkind (305) 536-6900
Assistant Federal Public Defender
150 West Flagler Street, Suite 1500
Miami, FL 33130-1555

Party name: M. K. B.

http://www.supremecourtus.gov/docket/03-6747.htm
6/19/2005

No. 04-1686

In The Supreme Court of the United States

Paul A. Reilly,

Petitioner(s)

v.

Alvin Weiss, Philip M. Freedman, Richard C. Camp, Arlene Albino, Toby Kleinman, Ilene Miklos, Timothy Welles, Mathias Hagovsky, David Brodzinsky, James Wulach, and Theresa M. Pagano

Respondent(s)

On Petition for Writ of Certiorari
to the Third Circuit Court of Appeals

APPLICATION TO THE HONORABLE DAVID H. SOUTER ASSOCIATE JUSTICE TO EXERCISE SUPERVISORY POWER OVER THE OFFICE OF THE CLERK WITH INSTRUCTIONS TO FILE UNSPECIFIED SUBSTANTIVE MOTIONS

Paul A. Reilly, Pro Se
153 Park Avenue
Randolph, N.J. 07869
(973) 945 - 1078

Summary of the Action

Two pre-certiorari decision "submissions"[2] were given to the Clerk for presentation to the Court. The Clerk has refused to submit them for the Court's determination.

The first submission makes the case the certiorari procedure is fatally defective unless the litigants and public have access to the cert pool memorandum prior to the certiorari decision. It argues the addition of the cert pool process into the certiorari procedure offers the average person acting as judge the possible temptation not to hold the balance nice, clear and true. It contends that, in both appearance and fact, law clerks exercise too much judicial power over the analysis and application of fact and law and the exercise of that power is inconsistent with Fundamental Fairness.

The second submission asks the Court to exercise its supervisory power to review the Clerk's refusal to file the first request and to instruct the Clerk to file both documents. Refusal to present both submissions to the Court is objected to because in refusing to present the documents, the Clerk:

(1) assumes the Justices' Article III power to decide substantive issues;

(2) elevates the power of the Clerk above that of the Court by refusing to allow the Court to review, and hence supervise, the Clerk's action(s); and

(3) the unrecorded refusals' abruptness trivializes these matters in the eyes of the passive observer and may allow this conduct to go unnoticed and uncorrected.

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[2]The term is used in this matter to identify the categories of "Motions" and "Applications" as documents which are designed to persuade the Court to take certain action(s).

Summary of the Action 1

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1. The Court's clerks should be instructed to file this and the two earlier submissions because the Court has both the power and history of hearing such motions. 8

2. It is not with a clerks' power to decide whether or not the cert pool memo is a judicial document. Nor is it within their power to decide, by implication, whether or not the cert pool exercises too much judicial power or whether the process is fundamentally fair 9

3. The clerks' refusal to present the petitioner's objection to their refusal to the Justices for review impermissibly elevates the power of the clerk above the power of the Court. 11 11

4. The shortness of the clerks' letters underestimates both the concerns with the cert pool and the gravity of the acts and omissions involved in dismissing those concerns. These acts and omissions cannot go unaddressed. 11

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Exhibits 14
Motion to File BI-B13

Motion for Access to Cert Pool Memorandum C - C23

> "Waiving response displays the proper disdain for a frivolous petition. And it is not the risk one might imagine: A respondent can be sure of an opportunity to file a brief in opposition if the justices surprisingly do find something of interest in the case." Bishop, Timothy S., Opposing Certiorari in the Supreme Court, Mayer, Brown, Rowe & Maw LLP's Appellate.net, July 3, 2005, pg.2 [3] Your brief in opposition should be low key, befitting the trivial issue the petitioner has tried to foist on the Court. A tone of bemusement, of a patient adult dealing with a confused child, is about right." Id. at 8.

The fact that the petitioner is an average person appearing pro se reason cannot be allowed to stand the Constitution on its head. If the Office of the Clerk can rule in your stead and prevent you from reviewing their decisions there is no doubt the Office of the Clerk is the final judicial authority.

Therefore, given the gravity of the issues and the need for supervisory action the only remedy is to instruct the Clerk's Office to file all submission and to decide the matters which they contain.

Conclusion

For all of the foregoing reasons it is respectfully requested the motion and all relief be granted.

Date: September 21, 2005

Respectfully Submitted
s/ Paul A. Reilly
Paul A. Reilly, Pro Se

[3] www.appellate.net/articles/oppcertinsc.asp

No. 04-1686

IN THE SUPREME COURT OF THE UNITED STATES
Reilly, PETITIONER

v.

Weiss, et. al.

ON PETITION FOR WRIT OF CERTIORARI TO THE
THIRD CIRCUIT COURT OF APPEALS

MOTION / APPLICATION FOR LEAVE TO FILE MOTION
FOR ACCESS TO THE CERTIORARI POOL
MEMORANDUM (PRIOR TO CERTIORARI DECISION)

Paul A. Reilly
153 Park Avenue
Randolph, N.J. 07869
(973) 945 - 1078

Petitioner moves this Court to exercise its supervisory power to file and provide a full hearing, including objection and reply, on Petitioner's Motion for Access to the Certiorari Pool Memorandum prior to review of Petitioner's petition for writ of certiorari ("Motion"). "[R]ecording is in legal effect the act of the court, and subject to its judicial control." Ex Parte Morgan, 114 U.S. 174,175 (1885).). "[J]udgment is the act of a court [which is] recorded ordinarily by the clerk as the ministerial officer of the court." Id."

As explained in the Motion, the Court acknowledges the right of public access in many different contexts in its own proceedings. It argues the character of the certiorari pool memorandum, as opposed to the title of the author, is that of a judicial document subject to both Common-law and Constitutional presumptions of right of access,

and claims a First and Fifth Amendment as well as common-law right of access prior to the certiorari decision.

It appears the Motion was not submitted to the Court as the June 15, 2005 letter from the Clerk refuses to file and returns Motion for the reason the "[rules of this Court make no provision for filing [the] motion * * * .(Attached as Exhibit A) [4]. However, since the Rules are silent on the matter they do not preclude it and thereby enable the Court to employ its supervisory power. Bank of Nova Scotia v. United States, 487 U.S. 250, 254 - 255 (1988), ("Federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions. ").

"Every court has supervisory power over its own records and files * * *." Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). However, "[t]here is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Craig v. Harney, 331 U.S. 367, 374 (1947). Judicial proceedings are public property. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18,27 (1994).

Accordingly, the Court has entertained motions to seal documents from public access, Attached as Exhibit C, as well as for public access to documents. Attached as Exhibit D.

Furthermore, motions concerning access are themselves treated by the Court as a matter of public record. Attached as Exhibit E.

So too, the Court has supervisory power to "control the disposition of causes on its docket with economy of time and effort for itself, for counsel and for litigants. Landis v. North American Co., 299 U.S. 248, 254 (1936) (See attached Exhibits F - K). Yet, "[t]here is no extra-constitutional power to create courts. Ex Parte Bakelite Corp., 279

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[4] The submission of this application/motion at this time is a result of the intense opposition to the Motion. (Attached as Exhibit B).

U.S. 438 (1929). Moreover, "[e]ven a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions. A contrary result 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'" Thomas v. Arn, 474 U.S. 140,148 (1985) (citations omitted).

> "It is manifest it was not left to the legislative power to enact any process which might be devised * * * and cannot be construed as to * * * make any process 'due process of law,' by its mere will. * * * We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors." Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 276 (1885).

"It is the inherent power of every court of justice * * * to correct that which has been wrongfully done by virtue of its own process." Arkadelphia Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134, 146 (1919). Moreover, since the Court has jurisdiction over the subject; i.e. to hear and decide disputes and questions concerning whether, when, and under what circumstances not to release the cert pool memo to the litigants and public, Nixon, 435 U.S. at 598 ("* * * access has been denied where court files might have become a vehicle for improper purposes."). Therefore, even if it is one of first impression, it also has the obligation to decide the issue, Cohens v. Virginia, 19 U.S. 264, 404 (1821). Accordingly, the Court is

asked that both this application/motion be filed and granted and the Motion for access be filed, heard and decided as is appropriate to the adversarial setting.

Date: July 16, 2005

Respectfully submitted
S/ Paul A. Reilly
Paul A. Reilly, Pro Se

No. 04-1686

In The Supreme Court of the United States

Paul A. Reilly,

Petitioner(s)

v.

Alvin Weiss, Philip M. Freedman, Richard C. Camp, Arlene Albino, Toby Kleinman, liene Miklos, Timothy Welles, Mathias Hagovsky, David Brodzinsky, James Wulach, and Theresa M. Pagano

Respondent(s)

On Petition for Writ of Certiorari to the Third Circuit Court of Appeals

MOTION FOR ACCESS TO THE CERTIORARI POOL MEMORANDUM

Paul A. Reilly, Pro Se
153 Park Avenue
Randolph, N.J. 07869
(973) 945 - 1078

Basis for Motion & Requested Relief

Certain Supreme Court Justices have organized their law clerks into a structure known as the "cert pool". Its function is to prepare a memo reviewing each petition of certiorari and recommending whether to grant or deny the petition. The memo is distributed to the participating Justices. There are no provisions for public access, including the parties, to this memo.

The lack of access raises the question of whether the cert pool memo is a judicial document and as such whether there is a right of public access pursuant to the Common-Law Presumption of Access and the Fifth Amendment of the United States Constitution, or in the alternative, pursuant to the First and FifthAmendments of the United States Constitution.

It is argued below the cert pool memo is a judicial document and that release is necessary to maintain confidence in the institution, comply with fundamental fairness, and assure a required independent judgment. Given these arguments, the purpose of this motion is to ask the Court toprovide access, prior to judgment, to the cert pool memo in this matter.

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CONCLUSION

For all of the aforesaid reasons the motion for access to the cert pool memo should be granted.

Date: 07-16-05

Respectfully submitted,

s/ Paul A. Reilly
Paul A. Reilly, Pro Se

No.

In The Supreme Court of the United States

Paul A. Reilly,

Petitioner(s)

v.

Alvin Weiss, Philip M. Freedman, Richard C. Camp, Arlene Albino, Toby Kleinman, Ilene Miklos, Timothy Welles, Mathias Hagovsky, David Brodzinsky, James Wulach, and Theresa M. Pagano

Respondent(s)

On Petition for Writ of Certiorari
to the Third Circuit Court of Appeals

MOTION FOR ACCESS TO THE
CERTIORARI POOL MEMORANDUM

Paul A. Reilly, Pro Se
153 Park Avenue
Randolph, N.J. 07869
(973) 945 - 1078

Basis for Motion & Requested Relief

Certain Supreme Court Justices have organized their law clerks into a structure known as the "cert pool". The function is to prepare a memo reviewing each petition of certiorari and recommending whether to grant or deny the petition. The memo is distributed to the participating Justices. There are no provisions for public access to this memo.

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Given these arguments, the purpose of this motion is to ask the Court to provide access, prior to judgement, to the cert pool memo in this matter.

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Jurisdiction

Every court has supervisory power over its own records and files. Nixon v. Warner Communications, Inc. 435 U.S. at 589, 598 (1978)

Notification to the Office of Solicitor General

Copies of this motion have been sent to the Office of Solicitor General ("OSG") and the OSG has continuously recieved notice since the inception of matters in the Court. Motion Certification of Service.

Supreme Court Open Access

The common law presumption of access applies to this Court as it is respected by this Court. The Court's docket of pending and decided cases is open to the public. Docket. (1). There is open access to the "Case Distribution Schedule." (2) "Questions Presented ", (3) Merit's briefs (4), oral argument audio transcripts (5) and transcripts of oral argument(6) and opinions and orders.(7). Furthermore, the Court offers the public A Reporter's Guide to Applications Pending Before the Supreme Court of the United States for use in covering pre-hearing applications. (8) .

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[1] www.supremecourtus.gov/docket/docket.html.

[2] www.supremecourtus.gov/casedistribution/casedistributionschedule.html

[3] www.supremecourtus.gov/publicinfo/press/pr_04-05-04.html

[4] www.supremecourtus.gov/publicinfo/press/pr_10-02-03.html

[5] www.supremecourtus.gov/publicinfo/press/pr_04-13-04.html

[6] www.supremecourtus.gov/publicinfo/press/pr_09-28-04.html

[7] www.supremecourtus.gov/opinions/opinions.html

[8] www.supremecourtus.gov/publicinfo/reportersguide.pdf

"All oral arguments are open to the public." A Visitor's Guide to Oral Argument at the Supreme Court of the United States.(9). Visitors are invited to attend. Visitor's Guide to the Supreme Court. (10). Representative of the press are seated in the red benches along the left side of the courtroom. The Court Building (11). "Prior to oral argument, other business of the Court is transacted." (12).

The Cert Pool Memo

"In the 1972 Term, Justice Powell urged that the Justices combine their efforts in the screening process by having their clerks work together in one 'cert pool.' The petitions would be divided equally among all the clerks in the pool, and the cert memos prepared by them would be circulated to each of the Justices participating. The Chief Justice and Justices White, Blackmun, Powell, and Rehnquist agreed to join in the cert pool. Justices Douglas, Brennan, Stuart, and Marshall declined to participate. In the present court, only Justice Stevens is not a member of the pool." Schwartz, Bernard, A History of the Supreme Court, Oxford University Press, New York, 1993, pgs. 370-71.

While the Justices make the final decision on what certiorari petitions to grant, the work on the petitions is done by the law clerks. In the vast majority of cases, the Justices' knowledge of the petitions and the issues they present is based on the clerks'

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[9] www.supremecourtus.gov/visiting visitorsguidetooralargument.pdf, p.2.

[10] www.supremecourtus.gov/visiting/guide-court.pdf, p. 2

[11] www.supremecourtus.gov/about/courtbuilding.pdf, p.2

[12] www.supremecourtus.gov/about/procedures.pdf, p.1

cert memos, and they normally follow the recommendations in their memos. Sheer volume, if nothing else, has made this the prevailing practice. Id. at 371.

> As soon as I am confident that my new law clerks are reliable, I take their word and that of the pool memo writer as to the underlying facts and contentions of the parties in the various petitions, and with a large majority of the petitions it is not necessary to go any further than the pool memo. In cases that seem from the memo perhaps to warrant a vote to grant certiorari, I may ask my law clerk to further check out the issues, and may review the lower court opinion, the petition, and the response myself. Rehnquist, William H., The Supreme Court, Revised and Updated, First Vantage Books, U.S.A., 2002, pp. 333-334.

At an October 27, 1982 public lecture at NYU Law School, "Justice Stevens conceded that he did not read 80 percent of the certiorari petitions presented to the Court. * * * The Justice reads only those where the granting of certiorari is recommended." A History of the Supreme Court, p. 370. The Justices themselves have expressed qualms about this delegation of the screening task. In declining to join the cert pool, Justice Douglas wrote to the Chief Justice: "The law clerks are fine. Most of them are sharp and able. But after all, they have never been confirmed by the Senate." Id. at 371.

Statement of Law

(1) THE JUDICIAL RECORD AND JUDICIAL DOCUMENTS

A document is recognized as a "judicial document" if it "merely sheds light" on the bases for judicial decisions.

In identifying a "judicial record" to which the presumption of access applies, the overarching principle is that such records consist of all "materials on which a court relies in determining the litigants' substantive rights." FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987); see also United States v. El-Sayegh, 131 F.3d 158, 163 (D.C. Cir. 1997) ("what makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process"); Smith v. United States Dist. Court Officers, 203 F.3d 440, 442 (7th Cir. 1999) (it is "a right of access to those records of a proceeding that are filed in court or that, while not filed, are relied upon by a judicial officer in making a ruling or decision. "); Smith v. United States Dist. Court for the S Dist. of Ill., 956 F.2d 647, 650 (7th Cir. 1992) (granting access to memo sent by Clerk of Court to all judges because, inter alia, trial judge specifically stated that he had relied on it in making his decision); Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982); Wash. Legal Found. v. USSC., 89 F.3d 897, 905 (D.C. Cir. 1996); United States v. Martin, 749 F.2d 964,968 (3d Cir. 1984). The common-law right extends even to judicial documents that merely shed light on the bases for judicial decisions. See, e.g., Brown & Williamson v. FTC, 710 F.2d 1165, 1181 (6th Cir. 1983) (noting public interest "in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions"); Joy v. North, 692 F.2d at 894 (requiring that "a report" used in rendering judgment be revealed: "[s]ince it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional

scrutiny. "). Brief for Petitioner, Estate of Kanter, Et. Al. v. Commissioner of Internal Revenue, No. 03-1034, p. 45 (13).

(2) THE COMMON-LAW PRESUMPTION OF ACCESS

There is a presumption of public access to judicial records under the common law. Nixon, 435 U.S. 597. It envisions "a pervasive common-law right to inspect and copy public records and documents, including judicial records and documents." Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 161 (3rd Cir. 1993).

The presumption prohibits the routine and perfunctory closing of judicial records. Miller v. Indiana Hosp., 16 F.3d 549, 551 (3rd Cir. 1994). Where a particularized need for restricting public access to legal memoranda exists, that need can be addressed by the tailoring of appropriate relief." In Re Providence Journal, 293 F.3d 1, 12 (1st Cir 2000); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 506-507 (1st Cir. 1989).

The party seeking to override the common-law right of access to any part of a judicial record "bears the burden of showing that the material is the kind of information the courts will protect" and "that disclosure will work a clearly defined and serious injury to the party seeking closure. Id. at 551 (citing Publicker Industries v. Cohen, 733 F.2d 1059, 1071 (3rd Cir 1984). Only the most compelling reasons can justify nondisclosure of judicial records that come within the scope of the common law right of access. FTC, 830 F.2d at 410.

"Once the document is deemed to be a judicial document the presumption favoring access attaches to it." United States v. Amodeo, 44 F.3d 141, 146 (2d Cir. 1995).

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[13] http://supreme.lp.findlaw.com/supreme_court/docket/2004/December.html#03-184)

(3) FUNDAMENTAL FAIRNESS

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be first notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (citations omitted). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections." Mullane v. Central Hanover Trust Co., 339 U.S. 206, 314 (1950). "[T]he root requirement of the Due Process Clause is 'that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest.'" Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985). The hearing must not only be at a meaningful time and in a meaningful manner, Goldberg v. Kelly, 397 U.S. 254, 268 (1970) (citations omitted), but must be tailored to the capacities and circumstances of those who are to be heard. Id. At 268-269. Adequate notice requires disclosure of all issues to be discussed and sufficient time to prepare. Yohn v. Love, 76 F.3d 508, 516 (3rd Cir. 1996).

The due process clause of the Fourteenth Amendment (14) to the United States Constitution guarantees to all parties in litigation the right to know the evidence and contentions advanced against them as well as the perceived facts which inform a judge's

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[14] Procedural due process imposes constraints on governmental decisions within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. Mathews v. Elderidge, 424 U.S. 319, 332 (1976)

decision. That guarantee includes a fair opportunity to meet those proofs, arguments and perceptions of fact. Ledezma v. A. & L. Drywall, 254 N.J. Super. 613, 618 (A.D. 1992) citing Goldberg v. Kelly, 397 U.S. 254, 267-271 (1970).

This Court has said that due process is denied by "every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true * * *. [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" In Re Murchison, 349 U.S. 133, 137 (1955) (citations omitted). Accordingly, excluding access to " 'documents that are preliminary [or] advisory' " is " 'inapplicable to judicial records * * * [a] court proceeding * * * is in its entirety and by its very nature a matter of legal significance. Indeed, the meaning and legal import of a judicial decision is a function of the record upon which it was rendered.'" United States v. El-Sayegh Hani, 131 F.3d 158, 162 (D.C. Cir. 1997) (citations omitted)

> Unless this principal is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if someone who decides the case may stray at will from the record in reaching his decision? Or consult another's findings of fact or conclusions of law, or recommendations or even hold conferences with him? * * * The hearer's report obviously played a part in the decision in this case. For it to have played a part without having been shown to the appellant clearly violates his right to have the decision based exclusively upon matters in the record, which are known to him, and can consequently be controverted by him. The individual litigant is entitled to be apprised of the materials upon which an agency is acting. He has a right not only to refute but, what in a case like this is usually more important, to supplement, explain, and

give different perspective to the hearer's view of the case. Mazza v. Cavicchia, 15 N.J. 537, 514-15 (S. Ct. N.J. 1954)

When the report giving the hearers digest of the evidence as his findings and recommendations is turned over to the director without coming to the attention of the licensee, doubt may well rise as to whether a true view of the facts have been conveyed to the director's mind. * * * The hearer may have drawn some erroneous conclusion in his report, or he may even have made some factual blunders. Such mistakes are not uncommon in both judicial and administrative hearings; indeed the whole process of judicial review in both fields is designed to guard against them. But if a party has no knowledge of the secret report or access to it, how is he to be protected himself? An unjust decision may very likely be the result were no opportunity is given to those affected to call attention to such mistakes. That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties in which they are not given an opportunity to controvert. In the instant case the hearer can be characterized as a 'witness' giving evidence to the judge behind the back of the appellant, who has no way of knowing what has been reported to the judge. . . . [I]t shocks one's sense of fair play on which our fundamental concepts of procedure are based. Mazza, 15 N.J. at 515-16.

(3) THE FIRST AMENDMENT RIGHT OF ACCESS

The Court has recognized a First Amendment right of access to judicial proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-78(1980). Although Chief Justice Berger noted that the question of "[w]hether the public has a right to attend trials of civil cases is a question not raised by this case * * *," Id. at 580, n 17., he recognized "that historically both civil and criminal trials have been presumptively open." Ibid.

"[T]the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government." Id., 448 U.S. at 587 (Brennan, J, concurring).

Lower courts have extended this right to civil proceedings and records. Publicker Industries v. Cohen, 773 F.2d 1059, 1067-70(3rd Cir. 1984)(Holding that the reasons supporting a First Amendment right of access to criminal proceedings apply with equal force to civil trials and documents). According to Circuit law it is "clear that the public and press possess a First Amendment and a common law right of access to civil proceedings; indeed there is a presumption that these proceedings will be open." Id. at 1071. While the Supreme Court "has not addressed the right to attend civil trials, each court of appeals to examine this question has concluded Richmond Newspapers applies and that a First Amendment right exists. North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 207, n.3 (3rd Cir. 2002) (citations omitted), cert. den. 538 U.S. 1056 (2003).

Circuit Court cases that implicitly or explicitly recognize a First Amendment right of access include the Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991) ("The First Amendment, independent of the common law, protects the public's right of access to the records of civil proceedings."); Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 23 (2d Cir.1984) ("[W]e agree with the Third

Circuit ... that the First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in Richmond Newspapers...."), cert. denied, 472 U.S. 1017 (1985); Rushford v. New Yorker Magazine, 846 F.2d 249, 253 (4th Cir. 1988) (pleadings and evidentiary documents should be open); Doe v. Stegall, 653 F.2d 180,185 (5th. Cir. 1981)(Cited Richmond Newspapers as the sole basis for its determination that the First Amendment guarantee of "public scrutiny of judicial proceedings" is implicated by the plaintiffs' failure to disclose their identities in the complaint.); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 (6th Cir. 1983) (implying a First Amendment right of access to court documents), cert. denied, 465 U.S. 1100(1984); In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) ("[W]e agree with the Sixth circuit that the policy reasons for granting public access to criminal proceedings apply to civil cases as well."); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983)(limiting First Amendment right to civil proceedings arising release, incarceration, and conditions of prisoner confinement)

There are two considerations to determine if the constitutional right of access applies to particular documents. Press-Enterprise Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1,8 (1986) The first consideration is whether materials like the cert pool memo have been open to the public in the past, because a tradition of accessibility implies to favorable judgment of experience. Press-Enterprise II, 478 U.S. at 8. The second consideration is whether public access plays a significant positive role in the functioning of the particular process in question. Id. When these two considerations are met the right of access may only be overcome based on findings that it is essential to preserve higher values and is narrowly tailored to serve that interest. Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S.501, 510 (1984).

Tradition is not meant * * * to be construed * * * narrowly. In re Boston Herald, Inc., 321 F.3d 174, 184, (1st Cir. 2003). Thus, given the recent advent of the cert memo "we look * * * to analogous proceedings and documents of the same " type or kind." Id. at 184 citing Rivera- Puig v. Garcia-Rosario, 983 F.2d 311, 323 (1st Cir. 1992) & Press Enterprise II, 478 U.S. at 10-11 (evaluating California pretrial hearings by looking to practices of other states and to other types of hearings, including probable cause hearings in Aron Burr's 1807 trial for treason).

ARGUMENT

Given the function of "The Cert Pool Memo" set forth above, it is clear that the cert memo is a judicial document .The Justices minimally rely on it as the prima facie source of their knowledge of the petitions and the issues they present. A History of the Supreme Court, supra at 371. The author's "word" is taken as to the underlying facts and contentions of the parties. The Supreme Court, supra at 334. Indeed, eighty percent of the petitions are not read. A History of the Supreme Court, supra at 370. Normally, they follow the recommendation of the memo. Id. at 371. Thus the cert pool memo is a "judicial document" because it is relied upon in the making of the decision even if it merely sheds light on it. Brown & Williamson, 710 F.2d at 1181.

> In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. In Re Peterson, 253 U.S. 300, 310 (1920).

The fact the memo is advisory is of no moment. [E]xcluding access to "'documents that are preliminary [or] advisory' " is "'inapplicable to judicial records * * * [a] court proceeding * * * is in its entirety and by its very nature a matter of legal significance. Indeed, the meaning and legal import of a judicial

decision is a function of the record upon which it was rendered.' "United States v. El-Sayegh Hani, 131 F.3d 158, 162 (D.C. Cir. 1997)(citations omitted). The conclusion that preliminary or advisory documents are judicial documents is further supported by the facts that (1) The District Court Magistrate Judge's findings of fact and law as well as the recommendation(s) for disposition are advisory. United States v. Raddatz, 447 U.S. 667, 683, n.11 (1980) (15). Like the Magistrate, the Administrative Law Judge submits proposed findings and recommendations to the FDIC. Landry v. Federal Deposit Insurance Corp., 204 F.3d 1125, 1143 (D.C. Cir. 2000) (Rudolph, C.J. concurring), cert. den. 531 U.S. 924 (2000).

There is, however, a fundamental difference between the process associated with the magistrate and ALJ reports and the "law clerk's" cert memo. The district Judge is required to make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. Raddatz,, 447 U.S. at 674. This is also true for the ALJ. Landry, 204 F.3d at 1143.

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[15] "In exercising our original jurisdiction under Art. III, we appoint special masters who may be either Art. III judges or members of the Bar; the role of the master is, for these purposes, analogous to that of a magistrate. The master is generally charged to "take such evidence as may be . . . necessary," Nebraska v. Iowa, 379 U.S. 996 (1965), and to "find the facts specially and state separately his conclusions of law thereon." Mississippi v. Louisiana, 346 U.S. 862 (1953). In original cases, as under the Federal Magistrates Act, the master's recommendations are advisory only, yet this Court regularly acts on the basis of the master's report and exceptions thereto." Raddatz, 447 U.S. at 683, n.11.

The above two examples demonstrate fundamental fairness. First, the parties right to know the hearing officer's perceptions of facts, arguments, and contentions prior to judgment, make exceptions to same, and to have a de novo determination of the record by the decisionmaker comports with the guarantees of due process. Mullane, 339 U.S. at 314; Yohn, 76 F.3d at 516; Ledezma 254 N.J. Super. at 618. Second, a de novo determination is the foundation for the exercise of independent judgment by Article III, § 1 judge. Raddatz, 447 U.S. at 673-675. Conversely, "unless this principal is observed, the right to a hearing itself becomes meaningless." Mazza, 15 N.J. at 514.

This Court has said that due process is denied by "every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true * * *. [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" In Re Murchison, 349 U.S. 133, 137 (1955) (citations omitted). Thus, the short of it is that public access to the cert pool memo does not presume a judge to be biased. Rather, public access checks temptation.

It does so for the reason the Court has held "judicial rulings, apart from surrounding comments or accompanying opinion, almost never constitute a valid basis for a bias or partiality motion." This is because judicial rulings, standing alone, "cannot possibly show reliance upon an extrajudicial source, and can only in the rarest circumstances evidence the degree of favoritism or antagonism required * * * when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal." (16) Liteky v. United States, 510 U.S., 555 (1994). Without access to the memo and the opportunity to

[16] It goes without say the Court is the highest court of the land and there is no appeal. In light of this fact Justice Jackson's words are compelling: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result)

object the "hearer can be characterized as a 'witness' giving evidence to the judge behind the back of the appellant, who has no way of knowing what has been reported to the judge * * * [I]t shocks one sense of fair play on which our fundamental concepts of procedure are based." Mazza, 15 N.J. at 515-516. It was recognized long ago in a replevin action that:

> "Evidence is to be given in open Court, in the presence of the parties, their attornies, the counsel, and all by-standers, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publickly stated, and, by the judge, are openly and publickly allowed, or disallowed, in the face of the country; which must curb any secret bias or partiality that might arise in his own breast." 3 Blackstone, 372. Buller, 310. W. B. Surviving Partner, & c. v. Latimer, 1788 U.S. LEXIS 579, *25, n.12 (4 U.S. 1) 1788.

The positive function recognized by the Court in Richmond Newspapers is making real the "indispensible attribute" which is to "satisfy the apperance of justice." The Court noted that:

> "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance. * * * [T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of

openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality. See, e. g., M. Hale, The History of the Common Law of England 343-345 (6th ed. 1820); 3 W. Blackstone, Commentaries *372-*373." Richmond Newspapers, 448 U.S. at 569 citing 1 J. Bentham, Rationale of Judicial Evidence 524 (1827). "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice' * * * and the appearance of justice can best be provided by allowing people to observe it." Id. at 571-72 (citation omitted).

CONCLUSION

For all of the aforesaid reasons the motion for access to the cert pool memo should be granted.

Date: 06/10/05

Respectfully submitted,
s/Paul A. Reilly

Paul A. Reilly, Pro Se

Article III, Section 1 of the United States Constitution

The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, received for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

First Amendment of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the United States Constitution

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

December 21, 2004

Paul A. Reilly
153 Park Avenue
Randolph, NJ 07869

RE: Reilly v. Weiss

Dear Mr. Reilly:

The above-entitled petition for writ of certiorari was received December 20, 2004. The papers are returned for the following reason(s):

The petition is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was August 21, 2001. Therefore, the petition was due on or before November 19,2001. Rules 13.1, 29.2 and 30.1. When the time to file a petition for a writ of certiorari in a civil case (habeas action included) has expired, the Court no longer has the power to review the petition.
The petition was submitted on a page size smaller then the required 6 1/8 x 91/4.

Returned in money order 5595 for $300.00.

All copies of your petition and appendix are returned.

Sincerely,
William K. Suter, Clerk
By:
S. Elliott
(202) 479-3025

Enclosures

Paul A. Reilly
153 Park Avenue
Randolph, NJ 07869
(973) 945 -1078

December 28, 2004

Via Federal Express

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington DC 20543

Dear Clerk of the United States Supreme Court,

This letter is in follow-up to our telephone conversation of December 27, 2004. At that time I announced who I was and I noted that one of the two boxes of documents that I had redelivered to the court on December 20, 2004 had been returned. There was no letter or reason given for the return (today, December 28,2004, I received the second box).

Upon receipt of the first box I called the Clerk's Office at (202) 479 - 3011 and, upon relating the above, was apparently transferred to a case manager. I did not get her name. However, I asked this person why the documents had been returned. From the background sound it seems she was referencing a computer. Her first response was that the documents needed to be delivered by November 19,2004. I explained the documents were due and delivered October 19, 2004. I also explained they had been picked up by the courier on October 18,2004 and delivered to the Court on October 19, 2004, but the Court thought they were postmarked on October 19,2004 and delivered on October 21, 2004. Therefore, they were returned as untimely.

After several calls to the clerk's office the documents were redelivered on December 20, 2004. The December 20, 2004 delivery included the affidavits and exhibits showing the original pickup and delivery conformed to the Court's instructions. After hearing the click of computer keys I was informed the petition for writ of certiorari was apparently out of time because it was scheduled to be delivered in 2001 and a subsequent rehearing on delivery was denied. However, the petition for certiorari deals with different events occurring at and after that time.

I wonder if there might be some confusion with Estate of Kantor, Et AI. v. Commissioner of Internal Revenue, Docket # 03-1034 (and 03-184).

Nevertheless, I was instructed to send one copy and have enclosed one copy of the following documents:

1. A conforming copy of the petition for the writ of certiorari,

2. A copy of the proof of service (see attached Exhibit A) referred to in the Transmittal Letter included in the December 20,2004 delivery. The original and copies of the Proof of Service were sent via overnight Federal Express on December 20, 2004 and the tracking number for the Court is 841680189356 (See Proof of Service).

3. A. copy of (my) petitioner Paul A. Reilly Rule 29.2 Declaration of Filing Pursuant to 28 U.S.C. § 1746.

4. A copy of the Ann E. Johnson Rule 29.2 Declaration of Filing Pursuant to 28 U.S.C. § 1746 (in regard to this declaration I explained that Ms. Johnson is a relative who was present at the house on October 18, 2004 when the messenger came and picked up the documents to be delivered to the Court, the Third Circuit Court of Appeals and the defendants' attorneys on October 19, 2004).

I have also enclosed a copy of this letter and a self-addressed, stamped envelope. Please stamp the copy and return it to me in that envelope.

Thank you.

s/ Paul A. Reilly
Paul A. Reilly, Pro Se

CC (w / encls): All Counsel via regular mail

No. 04-1686
Title: Paul A. Reilly, Petitioner
v.
Alvin Weiss, et al.
Docketed: June 15, 2005
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (02-1382, 02-2821, 02-3261, 03-1402)
Decision Date: March 10, 2004
Rehearing Denied: July 19, 2004

~~Date~~~	~~~~Proceedings and Orders~~~~~~~~~~~~~~
Oct 18 2004	Petition for a writ of certiorari filed. (Response due July 15, 2005)
Oct 18 2004	Appendix of Paul A. Reilly filed.
Jul 8 2005	Waiver of right of respondent Arlene Albino to respond filed.
Jul 12 2005	Waiver of right of respondents Toby Kleinman, et al. to respond filed.
Jul 22 2005	Waiver of right of respondents Mathias Hagovsky to respond filed
Jul 27 2005	DISTRIBUTED for Conference of September 26, 2005

~~Name~~~~	~~~~~Address~~~~	~~Phone~~~~~~~
Attorneys for Petitioner:		
Paul A. Reilly	153 Park Avenue Randolph, NJ 07869	(973) 945-1078

Party name: Paul A. Reilly

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4211
Party name: Arlene Albino

Christopher James Carey 4 Headquarters Plaza, P.O. Box
1991 (973) 292-1700
Morristown, NJ 07962-1991
Party name: Toby Kleinman, et al.

John A. Patti 20 Commerce Dr Suite 132
(908) 272-4220
Cranford, NJ 07016
Party name: Mathias Hagovsky

http://www.supremecourtus.gov/docket/04-1686.htm
9/1/2005

HAB.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

August 9, 1991

Re: The Pool

Dear Chief:

This supplements my note of August 6 addressing concerns about the increasing size of the Pool. I add that I have benefited from an independent review and annotation by my clerks of all Pool memos circulated to chambers. I understand that this is the practice in some, but not all, of the other chambers. While this independent review entails extra work for my clerks, I feel that it constitutes a brake against errors by Pool memo writers. Moreover, my clerks report that it enhances their understanding of the Court's entire docket and helps make them better Pool memo writers in the process.

Sincerely,

HAB

The Chief Justice

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

August 6, 1991

Re: The Pool

Dear Chief:

For some years now, I, too, have been concerned about the growth of the Pool. It seems that every time a new Justice arrives he almost automatically is assigned to the Pool. So long as there are four or three not in the Pool, there was a brake against errors that might be committed by Pool writers. Now John is the only non-participant.

I am not sure about Tony's suggested alternative, but I agree that the subject is something we ought to talk about at some conference in the near future.

Sincerely,

Harry

The Chief Justice

cc: The Conference

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HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

August 5, 1991

MEMORANDUM TO THE CONFERENCE

For your information I circulate a copy of my memo to the Chief and his reply to me. I assume we will be discussing this subject when we resume our Conference meetings.

Sincerely,

AMK

Enclosures

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

August 2, 1991

Dear Tony:

Your letter of August 1 about the cert pool points out an obvious weakness in it as the number of Justices who participate in it grows. As originally conceived by Lewis Powell, all members of the Court would have participated; but when it actually did get started, there were only five. By a process of accretion it has grown to seven, and as you point out, that number could increase to eight if our new colleague decides to participate.

I have not had time to fully consider whether I agree with your alternative proposal, but we certainly ought to be thinking along these lines. I hope you will circulate your memo to the Conference; feel free to also circulate mine if you think it would be helpful.

Sincerely,

Warren

Justice Kennedy

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

August 1, 1991

Dear Chief,

The cert pool is vital to our operations, and I think the Justice who succeeds Thurgood should be encouraged to participate. That would mean, though, that only John would be reviewing the petitions without the use of a pool memo.

I propose we alter the system so that in each case one pool member does not receive the pool memo but instead performs an independent review of the petition by whatever in-chambers system he or she selects. To insure review isolated from the memo, perhaps the exclusion rotation should be designed so a clerk for the excluded judge has not prepared the memo for that case.

This suggestion would impose a slight additional burden, but the benefit of an alternate form of review within the pool system may justify the extra effort.

If you think this idea or some variant of it has merit, I will be pleased to circulate this memo to the pool members for their comment.

Sincerely,

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Article I, Section 2, Paragraph 2 of the United States Constitution

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article III, Section I of the United States Constitution

The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, received for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III, Section 2 of the United States Constitution

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

First Amendment of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the United States Constitution

Section, 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall

be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support theConstitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 956. Powers and duties of clerks and deputies
The clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court.

28 U.S.C. § 957. Clerks ineligible for certain offices
A clerk of a court or any of his deputies shall not be appointed a commissioner, master, referee or receiver in any case, unless there are special reasons requiring such appointment which are recited in the order of appointment.

28 U.S.C. § 963. Courts defined

As used in this chapter, unless the context indicates otherwise, the words "court" and "courts" include the Supreme Court of the United States and the courts enumerated in section 610 of this title.

28 U.S.C. § 671(a) Clerk

The Supreme Court may appoint and fix the compensation of a clerk and one or more deputy clerks. The clerk shall be subject to removal by the Court. Deputy clerks shall be subject to removal by the clerk with the approval of the Court or the Chief Justice of the United States.

28 U.S.C. § 671(c) Clerk

The clerk may appoint and fix the compensation of necessary assistants and messengers with the approval of the Chief Justice of the United States.

28 U.S.C. § 675. Law clerks and secretaries

The Chief Justice of the United States, and the associate justices of the Supreme Court may appoint law clerks and secretaries whose

28 U.S.C. § 2071(a) § 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
(d) For the purposes of this section the following words or phrases shall have the meaning indicated:
(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
(2) the degree of relationship is calculated according to the civil law system;
(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:
(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the

judge participates in the management of the fund;
(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.
(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Supreme Court Rule 1. Clerk

1. The Clerk receives documents for filing with the Court and has authority to reject any submitted filing that does not comply with these Rules.

2. The Clerk maintains the Court's records and will not permit any of them to be removed from the Court building except as authorized by the Court. Any document filed with the Clerk and made a part of the Court's records may not thereafter be withdrawn from the official Court files. After the conclusion of proceedings in this Court, original records and documents transmitted to this Court by any other court will be returned to the court from which they were received.

3. Unless the Court or the Chief Justice orders otherwise, the Clerk's office is open from 9 a.m. to 5 p.m., Monday through Friday, except on federal legal holidays listed in 5 U. S. C. § 6103.

Supreme Court Rule 21. Motions to the Court

1. Every motion to the Court shall clearly state its purpose and the facts on which it is based and may present legal argument in support thereof. No separate brief may be filed. A motion should be concise and shall comply with any applicable page limits. Rule 22 governs an application addressed to a single Justice.

2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 17.3.

(b)A motion to dismiss as moot (or a suggestion of mootness), a motion for leave to file a brief as amicus curiae, and any motion the granting of which would dispose of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Rule 18.5 or a motion for voluntary dismissal under Rule 46) shall be prepared as required by Rule 33.1, and 40 copies shall be filed, except that a movant proceeding in forma pauperis under Rule 39, including an inmate of an institution, shall file a motion prepared as required by Rule 33.2, and shall file the number of copies required for a petition by such a person under Rule 12.2. The motion shall be served as required by Rule 29.

(c) Any other motion to the Court shall be prepared as required by Rule 33.2; the moving party shall file an original and 10 copies. The Court subsequently may order the moving party to prepare the motion as required by Rule 33.1; in that event, the party shall file 40 copies.

3. A motion to the Court shall be filed with the Clerk and shall be accompanied by proof of service as required by Rule 29. No motion

may be presented in open Court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument on a motion will not be permitted unless the Court so directs.

4. Any response to a motion shall be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action, and, in any event, within 10 days of receipt, unless the Court or a Justice, or the Clerk under Rule 30.4, orders otherwise. A response to a motion prepared as required by Rule 33.1, except a response to a motion for leave to file an amicus curiae brief (see Rule 37.5), shall be prepared in the same manner if time permits. In an appropriate case, the Court may act on a motion without waiting for a response.

Supreme Court Rule 22.

Applications to Individual Justices

1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief.

2. The original and two copies of any application addressed to an individual Justice shall be prepared as required by Rule 33.2, and shall be accompanied by proof of service as required by Rule 29.

3. An application shall be addressed to the Justice allotted to the Circuit from which the case arises. When the Circuit Justice is unavailable for any reason, the application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

4. A Justice denying an application will note the denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is untimely under Rule 30.2, the party making an application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except when the denial is without prejudice, a renewed application

is not favored. Renewed application is made by a letter to the Clerk, designating the Justice to whom the application is to be directed, and accompanied by 10 copies of the original application and proof of service as required by Rule 29.
5. A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination.
6. The Clerk will advise all parties concerned, by appropriately speedy means, of the disposition made of an application.

3rd Cir. IOP, CHAPTER 13: STAFF ATTORNEYS

Staff Attorneys based in Philadelphia work under the supervision of the Clerk and the chief Deputy for the Legal Division. They provide legal research and assistance to the court as directed.

Source: Third Circuit internal operating Procedures - July 2002

3rd Cir. IOP, CHAPTER 13: STAFF ATTORNEYS

13.1 Staff.

Staff attorneys based in Philadelphia work under the supervision of the director of the Staff Attorney's Office **Clerk and the Chief Deputy for the Legal division**

13.2 Duties.

Their duties presently include the following:

(a) Preparation of memoranda of law and fact on the merits, upon request of a circuit judge;

(b) Preparation of memoranda of law and fact and a recommendation as to disposition in appropriate pro se cases;

(c) Screening of an appeals for jurisdictional defects, inviting counsel to offer comments for the panel's consideration, ~~and referring the issue to an SMP standing~~ motions panel or the merits panel;

(d) Processing and monitoring ail pro se matters from the time ~~the litigant expresses a .desire to file a notice of appeal in the district court until the case is either disposed of by motion or submitted to a panel of the court for resolution on the merits, including answering all prisoner and pro se mail addressed to the court, corresponding with pro se litigants to ensure compliance~~ with the proper filing and motion practice procedures, and directing entry of appropriate records in the Clerk's Office; and

(e) Assisting in a wide variety of miscellaneous matters, including working in a judge's chambers when assigned by the director of the Staff Attorney's Office.

13.3 Director of the Staff Attorney's Office

The director of the Staff Attorney's Office works closely with the chief judge, the judges, and other officials of the court in continuing to develop a program for appropriate support to the court. The director of the Staff Attorney's Office has primary administrative responsibility for processing death penalty cases in this court.

Source: Proposed Third Circuit Internal Operating Procedures. www.ca3.uscourts.gov. December 2001 – June 2002.

CHAPTER 13. STAFF ATTORNEYS

13.1 Staff.
Staff attorneys based in Philadelphia work under the supervision of the Senior Staff Attorney.

13.2 Duties.
Their duties presently include the following:

(a) Preparation of memoranda of law and fact on the merits, upon request of a circuit judge;

(b) Preparation .of memoranda of law and fact and a recommendation as to disposition in appropriate pro se cases;

(c) Screening of all appeals for jurisdictional defects, inviting counsel to offer comments for the panel's consideration, and referring the issue to an SMP [standing motions panel] or the merits panel;

(d) Processing and monitoring all pro se matters from the time the litigant expresses a desire to file a notice of appeal in the District Court until the cases is either disposed of by motion or submitted to a panel of the court for resolution on the merits, including answering all prisoner in pro se mail addressed to the court, corresponding with pro se litigants to ensure compliance with the proper filing in motion practice procedures, and directing entry of appropriate records in the Clerk's office; and

(e) Assisting in a wide variety of miscellaneous mailers. including working in a judge's chambers when assigned by the Senior Staff Attorney.

13.3 Senior Staff Attorney.
The senior staff attorney works closely with the Chief Judge, the judges, and other officials of the court in continuing to develop a program for appropriate support to the court. The Senior Staff Attorney has primary administrative responsibility for processing death penalty cases in this court.

Source: Third Circuit Internal Operating Procedures - July 2000

COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS

+ + + + +

NEW YORK, NEW YORK

+ + + + +

PUBLIC HEARING

+ + + + +

THURSDAY

APRIL 16, 1998

+ + + + +

This transcript was produced from tapes provided by the Administrative Office of United States Courts.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., NW.
(202) 234-4433
WASHINGTON, D.C. 20005-3701
(202) 234-4433

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

[144] VICE CHAIR COOPER: Judge Edward Becker, Chief Judge of the United States Court of Appeals for the 3rd Circuit. Judge, thank you so much for being with us today.

JUDGE BECKER: Thank you, Mr. Vice Chairman and Judge Rymer, Executive Director Meador. For the record, let me first identify myself. My name is Edward R. Becker. I have been a Federal Judge for approximately 27 and half years. I was a U.S. District Judge in the Eastern District of Pennsylvania for 11 years. I have been a Judge for the United States Court of Appeals for the 3rd Circuit for over 16 years. I enter on duty as Chief Judge of the 3rd Circuit Court of Appeals on February 1. I have been a member and chairman of the Judicial Conference of the United States Committee on Criminal Law, a member of the board of the Federal Judicial Center, and a member of the Judicial Conference Committee on Long Range Planning. It is that latter role that prompted me on January 26 to write to the Commission in some detail expressing my thought on the Commission's

[145] charter. I felt that because I was so heavily involved in the drafting of the provisions of the long range plan dealing with the structure of the Appellate Courts that I had a duty to give the Commission, for whatever it might be worth, the benefit of my views. I deliberately sent that letter on January 26, that is before February 1, so that it would not come on the stationary of the Chief Judge of the 3rd Circuit. Because in connection with the proposals therein, I speak only for myself and I do not purport to speak for my Court. I will, however, speak for my Court on a number of other matters in which I know that the Commission is interested, namely the manner in which the 3rd Circuit does its business. I will not talk in detail about my letter, which is part of the record, although I will review salient points made.

I would like to begin with a brief description of how Appellate Judges do their work. I do so against the background of much fanfare about how Courts of Appeals can be more efficient and of the need to increase productive capacity in order to meet the workload of the Courts of Appeals.

[146] Now while the work of a Federal Appellate Judge is extremely demanding — I mean, for me it is and has been for 16 years a 7-day-a-week job — the process of doing it is very simple. You get the briefs and the motion papers or what have you and you read them. Then you think about them and you talk to your law clerks about them and you read their bench memos. But you read the briefs and you read the motion papers and then, obviously after the rest of the process is through, you write and you rewrite and you rewrite and of course it is the duty of every Circuit Judge to contribute to keeping up the consistency and coherency of the Circuit law and you read the opinions of the other judges.

But there is one very interesting thing I want to tell you about briefs. I found out long ago that they don't read themselves. You have got to read them yourself. So what are the efficiencies? How can we to cope with this be so much more efficient? Facts? E-mail? The Internet? They don't help you read the briefs. The only efficiency I know of is if you have somebody else read the briefs and tell you

[147] what is in them. And that would be, in my view, an abdication of our duties. It is reported that in certain Circuits, at least within certain kinds of cases, where they have the so-called screening function, the briefs in many cases are reviewed by staff attorneys who then come and report to the judges. We don't do that in the 3rd Circuit. We do not use staff — staff attorneys never look at a counseling case in the 3rd Circuit. They do pro se cases and they play a very important role in pro se cases. But pro se cases are decidedly different from counseling cases. Not that we give them any less attention. We don't. But many of them — the vast majority of them, the statistics show, really have no merit at all. We probably reverse maybe 10 or 15 percent of them, but you really need an interpreter. They are written in longhand and sometimes it is gibberish. And the staff attorneys perform a very important role in presenting them to us in an efficient way so that we can read them. That is not a problem that we have in counseled briefs.

In my view, the efficiency of delegating

[148] or what have you work on counseled cases and having them report to the judges in my view is highly undesirable Professor Hazard wrote in 1965, "It is not difficult to imagine ways in which the Appellate system could be reshaped to handle the present volume of appeals at a much higher rate of speed or to handle a much greater volume of appeals at the present rate of speed. But a it is difficult to imagine how one could organize a judicial establishment that would have this kind of productive capacity and at the same time retain the intimate personal responsibility that is characteristic of the Appellate judicial process today." That was true in 1965 and even though caseload has vastly increased, it is true — I know it is true in my Circuit and I believe in most Circuits today. But I just do not know how we can, in terms of the most critically important duty of Federal Appellate Judges, that is, to listen and read the Briefs and read the papers, how we can be more efficient and how we can delegate that.

In so far as responsibility for the

[149] maintenance of the consistency and coherency of Circuit law, I don't see how you can delegate that. I am going to talk about that a little bit more.

Lately, one of the judges from another Circuit said, well, they have the staff attorneys check this, that, and the other and we have it all on computer. There is no substitute for a judge having in his or her head knowledge of the law of his or her Circuit, and I will tell you how we do that in the 3rd Circuit in a few minutes.

VICE CHAIR COOPER: Judge, let me ask you one question that you have raised really for the first time we have seen in these public hearings. I take from your written paper that you say that maybe the D.C., Federal, and 1st Circuits are too small from an economic point of view looking toward the future. That they don't have the caseload to justify the money that Congress has to put into them. Would you amplify on that a little bit? I mean, what should we do about it since we are supposed to look at everything?

JUDGE BECKER: Well, I think what you have to do is to look at it within the framework — let me

[150] — if I can bridge into that, Mr. Vice Chairman.

VICE CHAIR COOPER: That is fine. Go ahead. Just keep that in mind.

JUDGE BECKER: Yes. I intend to get to that. I just wanted to finish this thought. The only other delegation would be if you relied more heavily on law clerk drafts of opinions, which judges don't want to do. The critically important thing in terms of this delegation is while Appellate commissioners and Appellate magistrates and staff attorneys are capable people, and while mass produced justice would probably be correct 95 percent of the time, these folks are not judges. They are not Article III judges. And if you miss, things fall between the cracks. If you miss 2 or 3 or 5 percent of the cases, that is in my view a very serious matter.

Now to turn directly, Mr. Cooper, to your question, but with some back-up. And I would like to reference the letter that I wrote to the Commission. I basically said that the seminal document with which this Commission should begin is the long range plan of the Federal Courts. The message I draw from that is

[151] that this Commission should not do its work only with its eye on 1998 and what we need now, but with its eye on the future, and the year most recently cited is 2020. If you are familiar with Professor Baker's article, he makes 2020 the judicial equivalent of 1984.

Now I asked, and you have them now –a month or more ago, knowing that I was coming here, I asked the administrative office to update the projections as to the Federal Appellate caseload. Because 2020 looks through the roof — what we in the Long Range Planning Committee call the nightmare scenario. You have, I take it, this document that they produced to me.

VICE CHAIR COOPER: Yes, sir. Yes, sir, I do.

JUDGE BECKER: And although the number of Appellate filings in 1997 exceeded those reported in the previous year by less than 1 percent, and the total Appellate filings projected for 2020 have decreased by approximately 13.4 percent — that is due largely to a decrease in projected prisoner appeals -

[152] the fact of the business is that they still project a threefold increase in filings by 2020. That is a matter of concern. Now my point is that this may counsel certain realignments and the basic principle that I would apply is to have in mind that the Everts Act, which created the Courts of Appeals, was passed in 1891. So leaving aside the split of the 5th Circuit, it has been 106 years since there has been any significant change in the structure of the U.S. Courts of Appeals. And if you make a change every 100 years, I think the Republic will survive.

The Long Range Planning Committee – and your staff aid sitting with you, Dr. Judith McKenna, played a very important role in this enterprise – really thought long and hard about the basic structure of the Federal Appellate Courts. We did not get into Circuit alignment. We didn't deal with that. But we thought about the question of whether there should be specialized courts and we unanimously rejected that. We said that generalists courts where you bring a broad-based view are the best kinds of Appellate Courts. We considered the matter of intermediate

[153] panels. We thought about the idea of an Appellate division of the District Court. We unanimously rejected that. We had retreats. I was the facilitator in retreats that we had all around the country. And by and large, there was no support for an Appellate division of the District Court. The District Judges said they are too busy. And if I may borrow a phrase from Professor Carrington's work, "Appellate Judges should have a reviewer's frame of mind." And District Judges sitting on an Appellate division are not likely to have a reviewer's train of mind.

VICE CHAIR COOPER: Do you think that could be summed up as there would be a fear of the sneer of the peer? It is if you had a fellow District Judge -

JUDGE BECKER: I could not have done that well, Mr. Cooper, and I thought about it for 24 hours.

PROFESSOR MEADOR: Let me ask for a clarification about that. District Judges now constantly review trials through new trial motions, correct?

[154] JUDGE BECKER: Correct.

PROFESSOR MEADOR: So what is the difference between that and what we are talking about, that is, the Appellate division?

JUDGE BECKER: Well, they are reviewing their own work. That is partly what Mr. Cooper said. Here they would be reviewing everybody else's work. I want to say that I think the principle problem is workload. They are just too busy.

PROFESSOR MEADOR: Well, suppose you added District Judges to cover that additional workload?

JUDGE BECKER: Well, if you are going to add — in my view, it doesn't make any sense to add District Judges to do Appellate work. If you need more Appellate Judges, then add more Appellate Judges Don't add District Judges.

PROFESSOR MEADOR: I am not trying to sell this. I am just trying to give you the arguments that are made that it is easier to add District Judges than Appellate Judges because at the Appellate Court you have all of the problems of collegiality and so on and so on, and it is just easier to do it at the District

[155] level.

JUDGE BECKER: Well, then I think you defeat the purpose of having an Appellate Court and having more coherence and consistency in Circuit law. I mean I think if we had no other alternative, Mr. Meador, and if the nightmare scenario of 2020 should eventuate, I think it is a possibility. We also rejected the notion of an inter-Circuit tribunal. The Supreme Court's caseload is down. We met with the - - I was one of the members of the Committee who met with the Chief Justice. There does not appear to be any need in the foreseeable future, even if there would be a few more Circuit splits or a few more Circuits created, for that. We also thought about and rejected the matter of discretionary review. Speaking for myself, if I have got to review a file to decide – the so-called easy case, to decide whether to take it — if it turns out to be an easy case, I would rather decide it. We are better off if we decide it in summary fashion.

Now in terms of the matter of Circuit size, I believe that the most important text is the

[156] Commentary to Recommendation 17, "The principle of each Court of Appeals should consist of a number of judges sufficient to maintain traditional access to and excellence of Federal Appellate justice but preserve judicial collegiality and consistency, coherence, and quality of Circuit precedent to facilitate effect Court administration and governance." And there is some other language about a court being a cohesive group of individuals who are familiar with ways of thinking, reacting, persuading, and being persuaded. Others have stressed that language more. The language that I stress is not so much the collegiality part, but that "the Court becomes an institution, an incorporeal body of precedent tradition, of shared experiences, and collegial feelings in which members possess a common devotion to mastering Circuit law, maintaining its coherence and consistency, thus assuring its predictability and adjudicating cases in like manner."

Now in the 3rd Circuit, we have pre-filing circulation. We read every opinion before it is filed. We comment and we catch a lot of problems and

[157] flag time and again cases which create a problem with existing Circuit law. One matter of 3rd Circuit practice that I know the Commission is interested in and I do want to note is that our judgment order or unreasoned disposition practice. I am pleased to say that we have all but abolished that practice. When I became Chief Judge, we had a retreat and I took it up with my colleagues and judgment orders are for the most part a thing of the past in the 3rd Circuit. But in terms of being able to master Circuit law, I respectfully submit that there is no way that the judges of the 9th Circuit can do what we do. It is just too large and there are too many opinions. I just don't see how any judge of the 9th Circuit, unless he or she has a superhuman brain, can master Circuit law the way we in the 3rd Circuit or judges in other Circuits can master Circuit law. And in my view, whatever else happens, the 9th Circuit consistent with that — I mean, to me that is the hallmark. And if the judges are not in a position to master Circuit law, and I don't mean having a staff attorney or law clerk look it up when the occasion

[158] occurs, then I think that Circuit has to be split. And I think when that principle, which in my view is the cardinal principle governing the size of Courts of Appeals — I submit that the 9th Circuit ought to be split and I suggested in my letter that apparently the only way to do it — unless you — I understand there have been some proposals to create three divisions in the 9th Circuit. To me that doesn't make any sense. If you are going to create three divisions, then create three courts or create two courts. I don't see what the sense of a division is. A court doesn't exist for administrative purposes. To be sure, the Courts of Appeals are also the administrative unit for the District Court, but there are a lot of different ways. I mean, so you administer space and you administer personnel. That doesn't have to be by Circuit. That could be by region. It could be northeast region and southeast region. You can do that. You can do that in a different way.

JUDGE RYMER: Judge Becker, if I may, how do you objectify? What kind of objective measure do you suggest that the Commission consider in deciding

[159] whether a Circuit — a Court of Appeals is too large to master the law of the Circuit or whatever other measure you would like to suggest?

JUDGE BECKER: Well, Judge Rymer, I have used Justice Stuart' s I know it when I see it with respect to the 9th Circuit. I think I would be hard- pressed to come up with objective calipers, but I guess you could do it in terms of basically the numbers — and I haven't tried to do any math, but I guess you could do it in terms of the number of opinions or at least the number of published or precedential opinions that a Circuit has.

JUDGE RYMER: Excuse me, Judge, but by those measures, there are several other Circuit Courts of Appeals that are not far behind.

JUDGE BECKER: Well -

JUDGE RYMER: If that is the pacing item, that is sort of the total number of opinions, then we may be in for a splitting on a fairly large scale basis (indiscernible).

JUDGE BECKER: Let me say that I was not under the impression that that was true, and I have

[160] not made a study of it. I certainly haven't focused on it. I did look in terms of the number of opinions that came out of the 9th Circuit. I have not looked in terms of the number of opinions that have come out of other Circuits. But -

JUDGE RYMER: Well, the 11th and the 5th and the 6th are not massively far behind.

JUDGE BECKER: Are we talking about precedential opinions?

JUDGE RYMER: Well, but isn't that just sort of hail chasing because you can opt yourself for how many published opinions one does and it is perhaps not necessarily good administration of justice (indiscernible).

JUDGE BECKER: Well, the only — I mean, in terms of our practice, and I am not familiar with the practice of other Circuits, the only opinions that we circulate are published opinions –precedential opinions.

JUDGE RYMER: Yes.

JUDGE BECKER: And I would limit it to that. Non-precedential opinions in my view — I mean,

[161] they may be subject to petition for rehearing, and obviously they are the responsibility of the panel, but they are not the responsibility of the full court. So I would measure it by the volume of precedential opinions. And obviously there has got to be some flexibility or leeway.

JUDGE RYMER: Right. If the 9th Circuit were essentially the same number of public opinions as say the 7th Circuit, would you say therefore that the 7th Circuit is too large? Or would you say no because it is divided by fewer judges who sit on the panels more frequently?

JUDGE BECKER: Well, I don't think you divide it by the number of judges because theoretically all the judges are supposed to be familiar with Circuit law — with published opinions. The 7th Circuit, as I am aware, I think publishes a far greater percentage of their opinions, I mean by an awful lot than other Circuits. And I question whether they have to publish everything they publish. Now it is also a much smaller, more cohesive Circuit in terms of geography and personnel, and therefore more of the

[162] judges — it is so much smaller that more of the judges are involved as panel members in more of the cases. And that, I think, dilutes the problem in some respect.

VICE CHAIR COOPER: Do you have an opinion, Judge, as to — I think it was 1980 – why the 5th Circuit Judges felt that it was desirable to split in the 5th and the 11th? I think this morning someone said all but one of the judges supported that, and I think that is historically accurate. Whereas it seems that certainly the majority, and maybe an overwhelming majority, of the 9th Circuit Judges feel differently with a Court that is as large or larger than the 5th Circuit. Do you have any insight into that that you can give us?

JUDGE BECKER: Well, I know there is a tremendous amount of ESPRI and ESPRI and Circuit pride. But I just wonder if they are not letting that get the better of things. The 5th Circuit now – I mean, I know there are a couple of Circuits who don't want their size increased and some of the courts are divided. I do understand the 9th Circuit is not

[163] monolithic on this point.

PROFESSOR MEADOR: Let me go back to back to idea that you mentioned a moment ago that was discussed this morning, and that is the idea of distinguishing between the Circuit and the Court of Appeals and the proposal would be to leave the Circuit intact but have the Court of Appeals sit and function through divisions. I thought I heard you say something to the effect that you didn't know what that would accomplish. The argument made in that direction, as I understand it, is that true you have — when you say three divisions, you have in effect three different Courts of Appeals, but they would all be part of the same Circuit, permitting the Circuit then to maintain uniformity Circuit-wide. Whereas if you split the Circuit, you create separate Circuits with the potential for adding inter-Circuit conflict and the only way to resolve it would be the Supreme Court. So it gives the idea of a regional control over uniformity in the law while permitting the Court to function through smaller units. Do you have any observations about this?

[164] JUDGE BECKER: Well, I mean I think it sort of sounds good, but I still don't see how that is any different — I mean, what you are basically saying is you've still got — you've still got one mega or one jumbo Circuit. Now it could be that there is some improvement by the fact that X number of judges will always sit together and therefore you don't have so many permutations and combinations of panel members, who in Judge Newman's universe would be strangers to each other. There might be an advantage to that. But nonetheless, you still have, from the point of uniformity, a jumbo Circuit.

I mean, I don't know if anybody has got the absolute solution for the 9th. I know it may seem somewhat radical, but on the basis of the figures I have seen, the only way you can do it is to split California. I think that the Republic would survive.

The California Supreme Court now has a certification procedure. If the problem is the northern and southern Circuit predicting what California state law is, you can certify it through the California Supreme Court. There could be an enbanc of the two Circuits.

[165] We believe one of the cardinal principles of long range planning was to have regional Circuits. I don't see that a Circuit that has Alaska and Arizona can in any sense be considered a regional Circuit. Idaho and Montana certainly are much more part of a region of the 10th Circuit. You are looking now at the whipping boy of the Federal Judiciary. I mean, I have managed to get everybody mad at me. I have demonstrated the value of -

VICE CHAIR COOPER: The First Amendment is a great thing, though, Judge.

JUDGE BECKER: Well, not even — what is better is life tenure.

VICE CHAIR COOPER: I see.

JUDGE BECKER: Life tenure is better. I have got my friends in the 1st Circuit mad. My son is a law clerk on the 1st Circuit, so I hear it. I got the 2nd Circuit mad. The D.C. Circuit, I have divided, and I have got them mad and I got the 4th Circuit mad. I don't have any agenda, I assure you. I am just saying if this nightmare scenario eventuates — and that is why I was careful to ask before I came

[166] here to see what the projections are. Then I say the D.C. Circuit is too small, the 1st Circuit is too small. The 1st Circuit arguably should be a New England Circuit.

JUDGE RYMER: Judge Becker, given the nightmare scenario that was projected, do you see, as some have suggested, that there is a real difference in the type of cases that may comprise those numbers? In other words, a good percentage of the nightmare are prisoner pro se cases, for example, which arguably should be handled in a different way from other cases. Do you have any views on that?

JUDGE BECKER: Well, I think — first of all, let me just say that one kind of case that I do not believe shows up in those statistics at all and it is in many respects the most onerous kind of case are the habeas corpus cases which are disposed of, most of them, by denying a certificate of appealability. That is a whole full-dressed habeas corpus case and review of a state record. So I don't think the statistics begin to show how onerous some of the pro se caseload can be. But with respect to most of the civil rights

[167] cases, Judge Ryner. I agree with you. They are much more expeditiously handled. And I do think that you have to discount them and give them a much lower weight. But the projections are frankly a little scary and it is only for that reason that I have said that the D.C. Circuit's caseload is so much smaller. The Federal Circuit to me never made any sense from – I mean, if you want to talk about a political compromise. You have a court that does patents and they do appeals from the Court of Veterans Appeals and then they do federal personnel appeals. The D.C. Circuit does marvelous work, but — and let me just say that notwithstanding my every 100 years comment, I want to make perfectly clear that I am not suggesting that the Commission engage in a redrawing exercise willy nilly. As I said in my letter, I acknowledge the value of long-working institutional arrangements and the importance of the ability of lawyers and judges to rely on precedent. So a strong case has to be made for disrupting Circuit alignment. I say you've got a strong case now in the 9th, as I understand it, and you have a strong case if we are